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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Agustin Sicairos-Acosta,

10 Petitioner,

11 vs.

12 United States of America,

13 Respondent.
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) CASE NO. CV-05-612-TUC-FRZ
) CR-04-493-TUC-FRZ

16 **ORDER**

17 Pending before the Court is Petitioner's October 11, 2005 "Motion to Vacate, Set
18 Aside, or Correct Sentence by a Person in Federal Custody (28 U.S.C. § 2255)." The Court
19 will dismiss the motion without prejudice because the Court lacks subject matter jurisdiction
20 over this second habeas petition.

21 **Background**

22 Petitioner entered a plea of guilty to Count One of the Indictment, which charged him
23 with conspiracy to possess with the intent to distribute cocaine, and Count Three of the
24 Indictment, which charged him with conspiracy to possess with the intent to distribute
25 methamphetamine. The Court imposed a sentence of sixty months on each count, to be
26 served concurrently.

27 After Petitioner was sentenced in this case, Petitioner filed a "Motion for Time
28 Reduction by an Inmate in Federal Cus[t]ody (28 U.S.C. Section 2255)" on December 14,

1 2004. On December 28, 2004, the Court issued an Order in which it concluded that
2 Petitioner had waived in his plea agreement his claim for a sentence reduction and that,
3 alternatively, his claim lacked merit under existing Ninth Circuit case law. The Court denied
4 the § 2255 habeas petition and dismissed the case (CV-04-693-TUC-FRZ).

5 On October 11, 2005, Petitioner filed the current § 2255 habeas petition in which he
6 seeks a modification of his sentence because his attorney was ineffective by failing to “object
7 to improper conclusions of Guidelines” because Petitioner was “not the leader of the
8 enterprise, nor was he the one that commenced the action” and by failing to “file
9 appeal/Booker issues.” He also contends that “[t]he Court abused its discretion in enhancing
10 the sentence with[out] the finds [sic] of Jury.”

11 12 **Discussion**

13 Under 28 U.S.C. §§ 2255 and 2244(b)(3), a petitioner may not file a second or
14 successive § 2255 habeas petition in the district court unless the petitioner has obtained a
15 certification from the Ninth Circuit Court of Appeals authorizing the district court to consider
16 the second habeas petition.

17 The Court already rejected Petitioner’s first § 2255 habeas petition. Petitioner’s
18 current petition, therefore, is his second § 2255 habeas petition. Petitioner has failed to
19 obtain permission from the Ninth Circuit before filing this second § 2255 habeas petition.
20 Therefore, the Court lacks subject matter jurisdiction over the second § 2255 habeas petition
21 and must dismiss it. *See United States v. Allen*, 157 F.3d 661, 664 (9th Cir. 1998)
22 (concluding that district court lacked jurisdiction to consider second § 2255 petition when
23 petitioner had failed to request certification from appellate court prior to filing the second
24 § 2255 petition in the district court); *United States v. Alvarez-Ramirez*, 128 F. Supp. 2d 1265,
25 1267 (C.D. Cal. 2001) (dismissing second § 2255 petition for lack of subject matter
26 jurisdiction because petitioner failed to obtain Ninth Circuit certification). The Court,
27 however, will dismiss the case without prejudice so that Petitioner can seek certification from
28 the Ninth Circuit Court of Appeals to file a second or successive § 2255 habeas petition.

1 Pursuant to Ninth Circuit Rule 22-3(a), the Court will direct the Clerk of the Court to
2 refer Petitioner's second § 2255 habeas petition to the Ninth Circuit Court of Appeals.
3 Moreover, as a courtesy to Petitioner, the Court will direct the Clerk of the Court to provide
4 Petitioner with a form recommended by the Ninth Circuit for filing an Application for Leave
5 to File Second or Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C.
6 § 2255.

7 8 **Conclusion**

9 In light of the foregoing,
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11 **IT IS ORDERED** that Petitioner's October 11, 2005 "Motion to Vacate, Set Aside,
12 or Correct Sentence by a Person in Federal Custody (28 U.S.C. § 2255)" (U.S.D.C.
13 document #53 in CR-04-493-TUC-FRZ) and this action (CV-05-612-TUC-FRZ) are
14 **DISMISSED WITHOUT PREJUDICE** to allow Petitioner to seek certification from the
15 Ninth Circuit Court of Appeals to file a second or successive petition.
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17 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL SEND** a copy of
18 this Order and Petitioner's October 11, 2005 "Motion to Vacate, Set Aside, or Correct
19 Sentence by a Person in Federal Custody (28 U.S.C. § 2255)" (U.S.D.C. document #53 in
20 CR-04-493-TUC-FRZ) to the **Ninth Circuit Court of Appeals**.
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22 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL SERVE** a copy
23 of this Order on **Petitioner** and **SHALL PROVIDE** Petitioner with a form recommended
24 by the Ninth Circuit Court of Appeals for filing an Application for Leave to File Second or
25 Successive Petition Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

26 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL SERVE** a copy
27 of this Order and Petitioner's October 11, 2005 "Motion to Vacate, Set Aside, or Correct
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1 Sentence by a Person in Federal Custody (28 U.S.C. § 2255)” (U.S.D.C. document #53 in
2 CR-04-493-TUC-FRZ) on **Respondent**.

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4 DATED this 31st day of October, 2005.

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8 FRANK R. ZAPATA
9 United States District Judge
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